

Gracia (Migration) [2017] AATA 2657 (6 December 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mr Elmer Hernandez Gracia
CASE NUMBER: 1618641
DIBP REFERENCE(S): BCC2014/3520073
MEMBER: Adrienne Millbank
DATE: 6 December 2017
PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 06 December 2017 at 2:37pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – No financial pooling or sharing of living expenses – Sponsor not divorced – Social recognition as a couple

LEGISLATION

Migration Act 1958, ss 5CB, 5F, 65, 359AA

Migration Regulations 1994, rr 1.09A, 2.03A, Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 26 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 22 December 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). The Delegate did not consider the evidence and information provided sufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
4. The Tribunal invited the applicant to attend a hearing on 31 October 2017. On 13 October 2017 the Tribunal received a request that the hearing be postponed. The Tribunal agreed to the request and the hearing was rescheduled. On 18 October 2017 the Tribunal sent a letter inviting the applicant to attend a hearing on 21 November 2017. On 19 October 2017 the Tribunal received a request that the hearing be rescheduled to the original date. On the same day the Tribunal was advised in writing that the request for reschedule to the original date was no longer required.
5. The applicant appeared before the Tribunal on 21 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and four supporting witnesses: the parties' son and his partner; the parties' daughter; and a former co-worker of the sponsor.
6. The Tribunal advised the applicant, pursuant to s.359AA of the Act, that it had information that would lead or would contribute to the decision under review being affirmed. The Tribunal advised that this information was in a summary record of interviews with the applicant conducted over the period 16–23 December 2014, and comprised conflicting advice provided by the applicant as to his residential addresses in 2013 and 2014, prior to being placed in immigration detention. The Tribunal advised that it also had concerns regarding the applicant's and the sponsor's immigration histories and the sponsor's marital status.
7. The Tribunal advised the applicant that it would be raising concerns and asking questions based on the information and concerns it had, and that when it did ask such a question he could seek an adjournment in order to consider his response and consult with his representative.
8. Much of the evidence and testimony provided to the Tribunal focussed on the role the applicant claimed to have performed as a carer of his mentally-ill daughter. The Tribunal advised the parties several times during the hearing that it would be making a decision on the basis of the applicant's claim to have been in a genuine de facto relationship with the sponsor 12 months before the time of application, that is, on 22 December 2013.
9. The applicant was represented in relation to the review by his registered migration agent, who attended the hearing.

10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

11. The applicant and the sponsor were both born in the Philippines, the applicant in 1952 and the sponsor in 1960.
12. The parties claim that they first met in 1977 when they were both attending university in Manila, and married in 1979. They have two children from this marriage, a daughter born in 1979 and a son born in 1982. The parties claim they separated in 1983. They did not however divorce at this time. The sponsor claimed that the marriage was not properly registered in the Philippines because she was not 21 years old and did not have parental agreement.
13. The sponsor travelled alone to Australia on a visitor visa in 1983 and remained, sponsored as a partner by her second husband, whom she married in 1984. She claims she divorced this husband in 1987. She claims she sponsored her children to join her in 1992, when they were 12 and 10 years old. She obtained Australian citizenship by grant in 1988, and the two children were included in her citizenship certificate in 1994.
14. The applicant's immigration history, summarised from the record of decision, is as follows:
- He arrived in Australia on 17 March 1991 on a Visitor visa which he had obtained under a false name, after his application for a Visitor visa was refused.
 - After his Visitor visa ceased on 17 June 1991 he remained unlawfully in Australia for 3 years and 6 months.
 - He applied for a Protection visa which was refused on 30 June 1995.
 - He appealed this decision with the then Refugee Review Tribunal, and it was affirmed on 11 February 1997.
 - After his Bridging C visa ceased on 19 March 1997 he remained unlawfully in Australia for 16 years and 9 months.
 - He was referred to the Department and placed in detention on 16 December 2014 as an unlawful non-citizen.
 - He applied for the Partner visa on 22 December 2014.
 - He applied for a Bridging E visa, and this application was refused on 24 December 2014.
 - He appealed this decision to the Tribunal and it was affirmed on 7 January 2015.
 - He was in a Detention facility as an unlawful non-citizen from 16 December 2014–9 March 2015.
 - On March 2015 his Partner visa application was refused on the grounds that he did not meet cl.820.211(2)(d)(ii). The Delegate was not satisfied that there was a compelling reason to waive Schedule 3 criteria.
 - On 18 March 2015 he appealed the decision to the Tribunal, and was granted another Bridging E visa in association with the review.
 - On 3 June 2016 the Tribunal remitted the Partner visa application to the Department with the direction that he met cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations.
 - On 26 October 2016 the applicant's Partner visa application was refused on the grounds that he did not meet cl.820.211(2)(a).
 - On 8 November 2016 he appealed this decision to the Tribunal.
15. The parties claimed at hearing that they re-married following the sponsor's divorce in 1987 from her second husband, after she had obtained permanent residence and citizenship; that

they properly registered this marriage in the Philippines; and that they had lodged a previous, unsuccessful, Partner visa application.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the parties were in a genuine de facto relationship at the time of application and this decision. The parties claim that they reconciled, following the end of the sponsor's fourth marriage in 2013, and that they have been together since 5 December 2013.
17. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
18. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a 'spousal relationship', but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
19. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

FINANCIAL ASPECTS OF THE RELATIONSHIP

20. The applicant advised, through his representative, that he could not provide evidence of financial pooling or sharing because, as he has had no work rights on his Bridging E visa, he has had no income to contribute. He advised further that before being granted the Bridging E visa he was in the country illegally and therefore not in a position to acquire liabilities or assets. The applicant at hearing acknowledged that he did work and obtain income during his years in the country as an unlawful non-citizen, and that he was working during 2013 and 2014 until the time of his arrest and detention. He maintained however that he and the sponsor were unable to provide evidence of financial sharing because his income as a kitchen hand and pizza deliverer was casual and sporadic, and that he was reluctant to jointly enter into any sort of financial agreement such as a car loan or tenancy agreement because he did not have a stable income and was afraid his unlawful status would be uncovered.
21. The parties claimed that the sponsor has fully supported the applicant since his release from immigration detention in March 2015. When asked why there was no evidence of this, why the sponsor's income wasn't deposited into the parties' joint bank account so they could both draw from it, and why the applicant's earnings weren't deposited into a joint account in 2013 and 2014 when they claimed to be living together in a joint household, the sponsor stated that she had always managed her own income and her own bank account. She stated that she gave cash to the applicant when he needed it. She advised that the parties only opened the joint account in 2015 after they had lodged the Partner visa application, and that they didn't use it. The applicant acknowledged that he still had his own bank account, in the alias that he used to obtain his Visitor visa in 1991. He stated that he had used his sporadic

earnings to support himself and to purchase medicine for his daughter. He stated further that he was often paid in cash.

22. The parties provided a record of transactions from their joint bank account from 27 January–27 March 2017. This shows several small deposits, in the order of \$45, earmarked as ‘savings’ for their daughter, followed by purchases or withdrawals of a similar amount a day or so later. It shows several small, one-person meal type purchases, and a closing balance of \$30. It does not show that the parties pooled financial resources or jointly funded a household or shared day-to-day living expenses. A statement of transactions from 23 October–9 December 2015 from the applicant’s personal bank account likewise shows a few small (\$30–\$120) deposits and single-person type purchases and a closing balance of \$3.
23. The Tribunal asked the sponsor about assets accumulated over 35 years and three husbands and four marriages. She stated that she has nothing; that she has supported herself and her children and that she has been in full-time stable employment only for the last two years. The Tribunal asked the sponsor to clarify her marital status. She advised that she divorced the applicant in 2011 in order to marry her third husband, an Australian citizen, in early 2012. She advised that she lived in a de facto relationship with her third husband for some years, possibly seven, before they married, that they separated in October 2013, but have not divorced.
24. The sponsor stated that in 2015, before she obtained her current job, she and the applicant lived rent-free in an apartment owned by her third husband. When asked whether the apartment was not in fact also her property, as she was still married to her third husband, she stated that she was not interested in property, and that as far as she was concerned she owned nothing. She also argued, however, that her third husband did not want a divorce because he did not want to divide up his assets in a property settlement. She claimed that she and her third husband separated when she learned that he was unfaithful to her; that they still got on well; and that he maintained close relationships with her children. She stated that instead of agreeing to a property settlement, he helped her and her family out in other ways, including financially. When asked why she hadn’t applied for a divorce herself, she stated that she was not prepared to pay the cost of lodging the application: she wanted her husband to pay this cost, and he had refused.

NATURE OF THE HOUSEHOLD

25. The parties claimed at the time of application that they lived together for 12 months from 5 December 2013–5 December 2014 at a New Farm address, an apartment rented by the sponsor. They claimed that they lived apart only briefly during this year, when the sponsor went to Sydney for work for a month in June-July. They claimed that the applicant had lived for only two weeks in his daughter’s flat, at the time he was apprehended as an unlawful non-citizen, and that he was living there because his daughter, who suffers from a mental illness, needed his live-in support. They claimed that they lived together from 6 December 2014–October 2015 in an apartment in Hamilton owned by the sponsor’s husband, where they stayed rent-free. They claimed that they have lived together at a Spring Hill address, in an apartment leased by the sponsor, since 23 October 2015.
26. In his first interview following apprehension, on 16 December 2014, the applicant, when asked to provide his residential address, gave his daughter’s New Farm address and stated that he had lived at this address from October 2014. He stated that before this he had lived at a Teneriffe address for 3-4 years. In a statutory declaration submitted with his Partner visa application on 22 December 2014, the applicant stated that this information was incorrect, that he had provided this incorrect information because he was confused and upset and under the effects of medication for gout and angina. At hearing the applicant repeated this claim.

27. Evidence of household was provided in the form of mail addressed to the applicant at both the sponsor's and his daughter's addresses. When the Tribunal asked the applicant to clarify his residential addresses in 2013 and 2014, he claimed that he had spent most of the year living in the sponsor's apartment, but that he was in the habit of providing incorrect addresses in order to lessen the possibility of being tracked down by immigration compliance. He stated that he had provided his daughter's address for the purpose of his driver licence, and that was another reason why he provided incorrect information when interviewed on 16 December 2014.
28. Witness testimony was provided by the parties' adult children and a former colleague of the sponsor that the applicant moved into the sponsor's apartment on 5 December 2013, along with the parties' two adult children. The parties' son explained that the sponsor was unemployed at the time and in receipt of Centrelink benefits; that their daughter was in receipt of a full Disability support pension; and that he was in receipt of a Student allowance. He stated that they decided to move in together for a while to share living expenses, and the applicant moved along with the parties' daughter, with whom he had been living in Tenerife.
29. At hearing the sponsor claimed that the applicant contributed to the household and helped her by doing the cooking and housework and, most importantly, by caring for their daughter, who lived in her own flat, nearby. In statutory declarations the parties and their children stated that the applicant helped his daughter with her daily living requirements, such as transport. Evidence was provided that the applicant was listed with Centrelink as his daughter's nominated contact person.
30. When asked whether he had ever supported his daughter financially, the applicant stated that he had not. He advised that she lived independently on her disability support pension, that she was sometimes in paid employment, and that the support he provided to her was emotional and practical, like driving her to work.
31. Copies of front pages of the sponsor's tenancy agreements for rental properties in New Farm and Spring Hill were provided. The Tribunal asked the sponsor why the applicant was not listed as a second occupant in her rental agreements for the period 6 December 2013–5 December 2014, and subsequently. The sponsor acknowledged that she had listed her cat as an occupant. She claimed that she didn't need to include the applicant. She claimed that the rental agencies were aware that the applicant lived in the properties she rented because he had been seen during six-monthly property inspections.

SOCIAL ASPECTS OF THE RELATIONSHIP

32. Statutory declarations were provided by former neighbours and friends and colleagues of the sponsor, in which they declared that they had seen the applicant at the sponsor's residence. Statutory declarations were provided by the parties' children who declared that their parents were re-building their relationship following the sponsor's separation from her third husband.
33. Photos were provided showing the parties together with family members, including the family of the parties' son's partner; and with friends. The parties' son and his partner brought their new son, the parties' first grandchild, to the hearing.
34. At hearing the parties' children advised that the sponsor's third husband visited and socialised with them and the sponsor often; that they had a good and continuing relationship with him; and that he did things for them like moving stuff with his truck.

NATURE OF PERSONS' COMMITMENT TO EACH OTHER

35. In their statutory declarations and at hearing the parties claimed that their relationship reignited when the applicant consoled the sponsor following her separation from her third husband in October 2013. The sponsor stated that she found the support the applicant provided to their daughter helpful, especially at times when she was employed. The applicant stated that both he and the sponsor were growing older and that they had decided to 'give it another go' and see how things turned out.
36. The parties' adult children declared in their statutory declarations and at hearing that they wanted their parents to be together again. The parties' adult daughter declared that she needed the continuing support of her father and that she would find it difficult to live and function without him.
37. The applicant had claimed in written submissions that he came to Australia and remained illegally in order to be with his children. At hearing he acknowledged, however, that he came to Australia a year before his children. He advised that the children lived with their maternal grandmother in the Philippines, that he lived 800 kilometres away and could not visit them because the bus fare was too costly. He claimed that at the time he entered Australia under a fraudulently obtained visa, he knew that the children would be sponsored later to join their mother, because he had discussed this plan with her.
38. As noted above, the Tribunal asked the sponsor to clarify the years of her marriages and divorces, and she advised that she is still married to her third husband. She claimed she could not remember the years when she married and divorced, or how long she spent living with her husbands. When prompted by her daughter, she advised that she married her third husband in January or February 2012, after obtaining a divorce from the applicant in 2011. She advised that she lived with her third husband in a de facto relationship for some years, possibly about 7, before marrying.
39. The Tribunal asked the sponsor why she divorced the applicant, given that he had claimed to come to Australia to be with his children. The sponsor stated that when she divorced the applicant in 2011 they had been estranged for a long time, that she had heard little of him during the previous 10 years. As noted above, the Tribunal asked the sponsor why, at the time of decision she still remained married to her third husband, given her claim to have been in a de facto relationship with the applicant for nearly four years. She claimed that while she got on well with her third husband and he continued to provide support for her and her family, she did in fact want a divorce. As noted above, she claimed that she hadn't applied for a divorce herself because she didn't want to pay the costs of lodgement, and her third husband wouldn't pay the costs because he didn't want to have to go through a property settlement.
40. The Tribunal asked the applicant why he hadn't tried to regularise his stay in Australia before he was apprehended. The parties' agent acknowledged that a Carer visa application, lodged at an earlier date, might have been more appropriate than a Partner visa application. The applicant's daughter claimed that she had urged her father to apply for visas at different times, but that neither she nor her father was able to raise the money required to lodge an application.
41. The Tribunal asked the applicant why he didn't lodge his Partner visa application before he was apprehended and why he hadn't alerted officials that he had a partner who would be worried about him. The applicant stated that he was fearful and desperate when taken into immigration detention. He stated that he phoned his daughter. He stated that it was only after he had been placed in detention that the sponsor passed on advice she had obtained

from a friend that he could stay in the country if he could establish that he was in a de facto relationship, and the decision was made to lodge the application.

FINDINGS

42. Limited evidence was provided, and the Tribunal does not find, that the parties have pooled their financial resources or shared living expenses commensurate with being in a genuine de facto relationship. The Tribunal acknowledges the applicant's claim that his unlawful status made it difficult for him to acquire assets, and that he was employed on a casual basis in lowly-paid jobs, but does not accept that the applicant's unlawful status explains why the parties have no evidence of pooling or sharing their money. The Tribunal notes that the applicant was in employment in 2013 and in 2014, and that the sponsor has been in full-time employment since 2015.
43. The Tribunal acknowledges the sponsor's claim that she has given cash to the applicant, but does not accept that this, in the absence of other evidence of sharing, constitutes evidence of a de facto relationship. The Tribunal further finds the fact that the sponsor and her third husband have not, at the time of decision, divorced and reached a property settlement, to be incongruent with her claim to have been in a de facto relationship with the applicant since 5 December 2013.
44. The Tribunal accepts on the basis of the witness testimony that the applicant moved into the sponsor's apartment with his daughter in December 2013. On the basis of the witness testimony provided by the applicant's son the Tribunal finds that this was for financial and family reasons rather than in order to live with the sponsor in a de facto relationship. Regarding the applicant's residential address at the time of application, the Tribunal finds the information most likely to be correct is that provided by the applicant in his first interview after being apprehended, on 16 December 2014, before he was advised that a Partner visa might provide an avenue for him to remain in Australia. On this basis the Tribunal finds that the applicant was not living with the sponsor as her de facto partner at the time of application.
45. The Tribunal accepts on the basis of the statutory declarations and witness testimony that the parties' adult children and some friends support the applicant's visa application. The Tribunal accepts that the parties have attended social events with their adult children, and that while living at the same address they have entertained neighbours and friends. However, for the reasons that the applicant decided to lodge the Partner visa application only after he was apprehended as an unlawful non-citizen, and the sponsor has remained married to her third husband, the Tribunal does not find that the parties have functioned socially and been recognised generally within the community as a couple in a de facto relationship.
46. The Tribunal found the sponsor to be vague and evasive when answering questions about her third and current husband. The Tribunal found her claim to be in a committed de facto relationship with the applicant while remaining married because her husband did not want to divide his assets, unconvincing. As noted above, the Tribunal finds the fact that the sponsor has remained married to her third husband incongruent with her claim to have been in a genuine de facto relationship with the applicant for nearly four years.
47. The Tribunal acknowledges that the applicant has provided care and support for his daughter during times she has suffered from episodes of mental illness, but does not accept that this constitutes evidence that the parties are in a genuine de facto relationship. The Tribunal acknowledges also that the sponsor has provided support to the applicant by sponsoring him for a Partner visa, but finds that this has been in the context of a relationship

between previous partners who have children together, rather than a couple in a de facto relationship.

48. The Tribunal therefore does not find that at time of application or this decision the parties had a mutual commitment to a shared life to the exclusion of others; that they were in a genuine and continuing relationship; or that they lived together or not separately and apart on a permanent basis.
49. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the visa application was made or the time of this decision.
50. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
51. Alternative criteria in c.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions) are not relevant to the circumstances of the applicant, and he has made no claims against these criteria.
52. For these reasons the Tribunal is not satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
53. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

54. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Adrienne Millbank
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).